A CRITICAL APPROACH IN COMPARATIVE LEGAL STUDIES: A Lesson for Islamic Legal Scholarship*)

Ahmad Rofii
Fakultas Syari'ah dan Ekonomi Islam
IAIN Syekh Nurjati Cirebon
Jl. Perjuangan By Pass Sunyaragi Cirebon
Email: *ahmadroff@gmail.com*

Abstrak

Kajian perbandingan hukum ortodoks percaya bahwa ada sains perbandingan hukum yang bersifat murni dan obyektif, yang dapat menjaga jarak dari konvensi dan historisitasnya. Melawan asumsi tersebut, tulisan ini berpendapat bahwa anggapan akan obyektifitas dalam kajian perbandingan hukum tidak dapat dipertahankan. Tulisan ini juga berupaya melihat masa depan kajian perbandingan hukum. Ia berpendapat bahwa adalah tidak kritis untuk mengatakan bahwa ada teks hukum yang dapat dipahami di luar konteksnya, karena setiap teks berada dalam situasi tertentu dan lekat dengan konteksnya. Pandangan positifistik terhadap hukum sudah usang. Tugas penelitian perbandingan bukanlah untuk mencari kebenaran-sebagai-ketepatan. Tetapi, ia berupaya untuk menyingkap dimensi laten dari hukum. Obsesi ortodoksi untuk melakukan uniformasi hukum menyembunyikan fakta akan perbedaan.

Kata Kunci: *Kajian perbandingan hukum, ortodoksi, pemahaman, kesamaan, perbedaan*

Abstract

The orthodox comparative legal studies believe that there is a pure and objective science of comparative legal studies able to distance itself from "conventions" and its historicity. Against this assumption, this paper will argue that the objectivity claim in comparative legal studies is flawed. This paper also attempts to see what the future of comparative legal studies could be. It argues that it is uncritical to say that there is a legal text that can be understood out of its context, because every text is situated and embedded. The positivistic view of law was obsolete. The duty of comparative research is not to search for truth-as-correctness. Rather, it attempts to unconceal the latent dimension of law. The orthodoxy's obsession to uniformization of law deceives the fact of difference.

Keywords: *Comparative legal studies, the orthodoxy, understanding, sameness, alterity*

Introduction

The established approach in comparative legal studies, or what is popularly known as "comparative law", remains that conducting comparative legal research is an attempt to achieve an objective knowledge of legal system or rules of law. This knowledge is gained through freeing research processes from any subjective evaluation. Furthermore, it is also freed from its "conceptual contexts and striped of [its] national doctrinal overtones".[1] Because there are such objective and scientific research, it becomes feasible to develop "an international legal science" and "a universal comparative legal science";[2] it is still valuable to have the rule-comparison research in comparative legal studies.[3]

This approach is evidently undertaken by many writers on comparative Islamic law. It is haunting their method used in exposing comparatively Islamic legislations in many Muslim countries. Tahir Mahmood, for instance, once claimed that his book was aimed to be "an authentic study of the development of personal law in the contemporary Islamic states".[4] In the revised edition of his book on status of women in Islamic legislations, Jamal Nasir asserts that the book covers "the subject objectively… a true and comprehensive exposition".[5]

The above claim is no longer unsupportable and indefensible; its fundamental assumptions have been subject to wholehearted criticism. The belief that knowledge the researcher gathers can be freed from his/her "subjectivity" and embeddedness would be completely rebuffed, because, as Richard Rorty says, "no rigorous argumentation that not obedience to our own conventions".[6] Challenging the orthodoxy, this paper will argue that the objectivity claim in comparative legal studies is flawed since any statements are in fact prejudged. It is also uncritical to say that there is a legal text that can be understood out of its context, because every text is situated and embedded. This criticism affects seriously the very fundamental of the orthodox comparative studies. Acknowledging this criticism, this paper attempts to see what the future of comparative legal studies could be.

Comparative Legal Research and the Nature of Understanding

Under the Cartesian paradigm, the orthodoxy maintains that comparative legal research is under the duty to get the exact, real and pure data irrespective of critical evaluation.[7] The idea of purity, law as a pure science, and commensurability colors the "methodology" of comparative research. Hein Kotz argues that in order to find out a pure concept "[comparative lawyers] must cut themselves loose from their own doctrinal and juridical pre-conceptions and liberate themselves from their own cultural context".[8] The orthodoxy attempts to neutralize the comparative formations from their embeddedness in all experiences. Because there is no place for probable

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*) In preparing the early draft of this paper, the author wants to acknowledge his intellectual debt to Professor Pierre Legrand.

[1]Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law*, 3rd rev ed, trans. Tony Weir (Oxford: Clarendon Press, 1998), 44.

[2]Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law*, 45, 46 respectively.

[3]Michael Bogdan, "On the Value and Method of Rule-Comparison in Comparative Law" in Heinz-Peter Mansel *et al* (eds), *Festschrif für Erik Jayne* (Munich: Sellier, 2004), 1239.

[4]Tahir Mahmood, *Personal Law in Islamic Counties: History, Text and Comparative Analysis* (New Delhi: Academy of Law and Religion, 1987), Preface.

[5]Jamal J. Ahmad Nasir, *the Status of Women under Islamic Law and Modern Islamic Legislations*, 3rd edition (Leiden and Boston: Brill, 2009), xi-xii

[6]Richard Rorty, *Consequences of Pragmatism* (1982), available at <http://www.marxists.org/reference/subject/philosophy/works/us/rorty.htm> at 25 May 2007.

[7]On the similarity between the orthodoxy and Cartesian approach, see Pierre Legrand, "Paradoxically, Derrida: For a Comparative Legal Studies", *Cardozo Law Review* 27 (2005): 645-54.

[8]Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law*, 10.

knowledge, comparative legal studies are deemed a perfect system which provides the best legal solutions. The underlying objective of the orthodoxy is the commensurability, that of getting a pure data and an exact representation.[9] The findings the comparatist gathers are believed as coming from a process of freeing the data from its contexts and, accordingly, are assigned to a pure and neutral legal knowledge. Produced from this rigorous process, this knowledge is certainly the truth that the comparatist is assigned to achieve. Comparative legal studies are an "ecole de verité".[10] In this sense, truth is understood as correctness. There exists correct and false knowledge. As a consequence, there is 'a better solution' for any legal problem.

Criticizing the Cartesian dualism – the subject *vis a vis* the object (the world), Martin Heidegger suggests that the individual is "thrown" in the world. He/she is "always-already part in the world". He/she is a historical being and this historicity is inherent in his/her present condition. In this sense, to understand the legal world the comparatist, for instance, could not distance his/herself from the world and make detached cognitive articulations, rather he/she will understand through absorbing involvement in the world.[11] To say something like Descartes' truth-as-correctness and any Platonic metaphysical claim, therefore, fails to regard this fact. Truth cannot be distanced from the historical settings. Against the objectivity claim, Heidegger sees the understanding of the world as based on pre-conception (*vorgriff*). It is 'never a presuppositionless grasping of something previously given'.[12]

Along with Heidegger's legacy, Hans-Georg Gadamer argues that understanding is embedded in experience. Criticizing the subject-object dichotomy, Gadamer contends that the interpretation is never propositional in nature. There is no self-sufficient understanding by which the understanding is detached from its historicity.[13] In line with Heidegger, he regards every interpretation as starting from "fore-conception". It works through the confirmation of fore meanings which might be completely unobserved. The act of understanding is governed by prejudices which are situated in tradition. The understanding, therefore, has more to do with a participation "*in event of tradition*".[14] The objectivity argumentation is based on the claim that something we want to know exists in a closed context with no historical interest assumed. The fact is otherwise, as every interpretation is situated within tradition. As this is the case, the interpreter is inescapably trapped in the so-called "horizon". And because one never has a closed horizon, since he/she is always shaped by the historicity, the only remaining is the fusion of horizons, in which the present and the past are blended and combined.[15] The concept of history is greatly emphasized by Gadamer for it decides in advance the significance of any understanding and the likely appearance of an object of understanding. The objectivity claim covers up the fact that the understanding is trapped in the 'web of historical effects'. This is already evident in the moment of asking the right question.

[9]Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law*, 649.

[10]Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law*, 15.

[11]Pierre Legrand, "Comparative Legal Studies and the Matter of Authenticity" *Journal of Comparative Law* I (2006): 398; Pierre Legrand, "Heidegger, Martin (1889-1976)," in *Comparative Law: Course Material for Intensive –Sem 1* (2007), 107.

[12]Martin Heidegger, *Being and Time* trans by Joan Stambaugh (New York: State University of New York Press, 1996), 140-1

[13]"Gadamer, Hans-Georg (1900-2002)" in *Comparative Law*, 110.

[14]Hans-Georg Gadamer, *Truth and Method*, trans. by Joel Weinsheimer and Donald G Marshall, 2nd ed. (London: Sheed & Ward, 1989), 290. Emphasis is in original.

[15]Hans-Georg Gadamer, *Truth and Method*, 304, 306.

This historical consciousness, or the hermeneutical situation, implicates that it is impossible to have any objective interpretation. As Gadamer puts it, "[w]e always find ourselves within a situation, and throwing light on it is a task that is never entirely finished".[16]

Jacques Derrida also provides a robust criticism against the Cartesian rationality. He argues that the understanding is embedded in the individual's linguisticality and historicity. He argues that the interpreter is situated and embedded in the sets of circumstances and the text is also embedded and situated. The embeddedness of the interpreter undermines the orthodox concept of a subject. The subject, according to Derrida, is in fact "a system of relations between layers" including mental, society and world.[17] For Derrida, the meaning of the text is never accomplished and final. It is always deferred. Everything is divisible, "there is no atom".[18] The inconclusiveness and divisibility of meanings make the truth always in plural. As a result, the search for the truth becomes not so much valuable.[19]

For Derrida, "*there is no out-of-text*";[20] all is world and there is no outside-the- world; also, there is no inside-the-world, everything is the world. Thus, it is impossible to say that there is a text and contexts detached from it. Every element of contexts is the text itself. Relevant to this is what Derrida calls "trace". Trace, which is invisible and concealed like economic, social and politic, is "contained in" the text. It is another form of present. It is not around the text and also not *in* the text. It is constitutive of the text, it is the text. The text, in this sense, is haunted by the trace (the ghost). Instead of ontology, Derrida proposes "*hauntology*". It is impossible not to be haunted. The ghost itself is "more important than words".[21]

As the knowledge begins from the observer's pre-understanding and "conventions", the nature of research could not be pure and neutral from his/her own interests. He/she is bringing the discursive power in the processes of understanding. A comparatist, for instance, is never merely describing laws; rather, he/she is proposing his/her own interests or goals and shaping the nature of those laws in accordance with these goals. As Pierre Legrand contends, "[d]escription is ascription".[22] Because what the observer describes is not "a pure description", it is enough to say that it is difference which governs the relation between the description he/she made and the "object" of the description. In this sense, the claim of an exact representation is totally absurd. The word "re-presentation" itself means "something which is presented *anew*".[23] Thus, instead of presenting something alike or similar, the observer is providing a new presentation of the "object".

In sum, the knowledge believed by the Cartesian rationality and its adherent – the orthodox comparative legal studies, to be objective and pure is inevitably something embedded in our own historicity, the result of our own ascription, something

[16]Hans-Georg Gadamer, *Truth and Method*, 302.

[17]"Jaques Derrida: Excerpts from Various Publications" in *Comparative Law*, 122.

[18]"Jaques Derrida: Excerpts from Various Publications", 121.

[19]See Pierre Legrand, "Paradoxically, Derrida: For a Comparative Legal Studies", 676-7. For Pierre Legrand, "Comparative Legal Studies and the Matter of Authenticity", 440; "the notion of truth is, in fact, ineffectual." Richard Rorty even undermines the value of talking about the truth. He contends that "truth is not the sort of thing one should expect to have a philosophically interesting theory about." See his "The Fate of Philosophy" *The New Republic*, 18 October 1982, 28.

[20]"Jaques Derrida: Excerpts from Various Publications", 119. See Pierre Legrand, "Paradoxically, Derrida: For a Comparative Legal Studies".

[21]"Jaques Derrida: Excerpts from Various Publications", 127; there is "the non-legal or pre-legal origin of the legal".

[22]Pierre Legrand, "The Same and the Different" in Pierre Legrand and Roderick Munday (eds), *Comparative Legal Studies: Tradition and Transitions* (Cambridge: Cambridge University Press, 2003), 240, 254.

[23]Pierre Legrand, "The Same and the Different". Emphasis is in original.

we have already predicted in advance, never finished, and the product of, as Rorty states, "our own conventions".

The Consequences for Comparative Legal Studies

The aforementioned discussion brings us to the argument that comparative legal studies can no longer claim for the attainment of an objective legal knowledge. The orthodoxy's reliance on such a claim is based on the assumption of truth-as-correctness which is only one type of "truth". The truth, as Derrida contends, is plural. The objectivity claim denies the fact that the comparative legal research is never divorced from the world, the tradition. It is always come from comparatist's fore-conceptions, prejudices and historicity. The comparatist is always trapped in "the prison house of culture".

The rejection of the scientific nature and of the objectivity of comparative legal research leads to questioning the idea of unification of laws (*ius commune*) as the orthodoxy attempts to achieve.[24] The project to uniform laws from different legal systems and traditions requires that rules of law being compared must be freed from any peculiar legal cultures. As discussed above, this assumption is deceiving the fact the cultural and social contexts are always haunting those rules. Law, accordingly, is haunted by moral, social and cultural events. These events, or what Derrida calls trace, are the law itself. Unlike the written law, this type of law is invisible and concealed. It is another form of the law. One can only reach the law's veneer if he/she divorces the written law (the text) from its traces. In line with this and contrary to the orthodoxy's assumption, comparative legal studies should acknowledge the significance of both the written law and its trace.

From the orthodox point of view, Europeanization of private law is a blatant evidence of the uniformization of law. There is only one law for a legal problem in all European countries. However, with regard to the principle of good faith, for instance, what in fact happens is the expression of local law against the notion of uniformity. What Teubner calls "legal irritants"[25] demonstrates that the Continental principle of good faith irritates the Common Law system. It contrasts to the very idea of 'the market-driven production regime' which haunts the Common Law. Although this is concealed and invisible, it exists and inspires the system. This explication demonstrates the embeddedness of law in culture. The unification will always face singularization.

By acknowledging the situatedness of law, it is unsupportable to maintain the orthodoxy's positivistic conception of law. The orthodoxy, haunted by legal positivism, regards law as merely rules, statutes or precedents. There is the law and outside the law. To be a good comparatist, one 'must sometimes look outside the law'.[26] This conception paves the way to unifying laws. In struggling to uniform laws, the comparatist has to seek something that will fulfill this obsession. The choice is given to rules because they are more easily studied and likely to be more certain, 'unpolitical'. As has become clear from the previous discussion, dealing with law in terms of rules (words) is deceiving. It is merely reaching law's veneer. Comparative legal studies, therefore, should regard all forms of law, namely the written law and traces. In this respect, the study of law as culture becomes inevitable. Law-as-culture[27]

[24]See Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law*, 16; "comparative law as a contribution to the systematic unification of laws".

[25]Gunther Teubner, "Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences", *Modern Law review* 61 (1998): 11.

[26]Gunther Teubner, "Legal Irritants", 39.

[27]Pierre Legrand, "Comparative Legal Studies and the Matter of Authenticity", 374, law-as-culture is 'the framework of intangibles within which an ascertainable 'legal' community (understood here in the more specialized or technical sense) operates and which organized (not always seamlessly) the

assumes that political, economical and social or simply culture is not surrounded around the law. The law is the expression of culture, irrespective of its any variations. The law speaks culturally and culture speaks legally. Culture has its core, called tradition that constitutes to a great extent the very foundation of collective identity. It is also named '*mentalité*'.[28] In the realm of law, the so-called legal tradition maintains the sustainability of 'a horizon of meanings and possibilities' of any idea of law. The point here is not that it denies any changes and requires the closeness. The notion of tradition entails no fixity. '[I]ts history is one of continuous change'.[29] It has to do with "a sense of belonging", so we can say, for instance, that law is "characteristically French".

The embeddedness of law in "conventions", culture and that of legal tradition is apparent in the reading of *Attia v British Gas Plc*.[30] In delineating the decision, the authors of *Markesinis and Deakin's Tort Law* contend that the recovery for psychiatric illness because of witnessing damage to property, although 'difficult to explain' demonstrates the duty of care may arise from an assumption of responsibility for not to cause the risk of psychiatric illness.[31] By closely reading the decision, we can argue that the decision confirms its embeddedness in the English legal tradition. The employment of the word "home" instead of house shows the trace accompanying the decision. Unlike house, home in English culture contains an emotional dimension. It is a love object. For Lord Dillon, for instance, the question was about 'a woman [saw] her *home* and its contents burning down'.[32] Lord Bingham talked about a destruction of home and property. By using home the House of Lords actually suggested that this case was just like *McLoughlin*[33] in that it regarded something to whom/which love was nurtured. It was not merely about property. Home was a place where everyone felt comfortable, relax and safe ("being at home"). It is inherently positive and very powerful. This is a reading which is unthinkable for the positivist comparatist.

Law-as-culture clearly rejects the idea of unification of laws. The uniformization of laws is employed by reducing or eliminating of the differences among national legal systems. It place great emphasis on sameness. There is the same or very similar solution for the same problem of life across different legal systems.[34] This is the so-called '*praesumptio similitudinis*'.[35] Even if the comparatist could not assume this sameness, he/she is suggested to 'manipulate' the data in order to force the likely different laws to become similar.[36] Law-as-culture assumes differences, the unification of laws demands sameness. What matters for the latter (the orthodoxy) is 'the perceptual dimension' of law; law is being distanced from its locality and temporality.[37] By carrying out transendentalization, what happens is similarity. The "new" comparative legal studies maintain that law is always 'law-in-

identity of such legal community *as legal community*'.

[28]For an exploration of the concept of *mentalité* and legal tradition, see Pierre Legrand, "Comparative Legal Studies and the Matter of Authenticity", 376-8. See also Martin Krygier, "Law as Tradition", *Law & Philosophy* 5 (1986): 237.

[29]Michael Oakeshott, *Rationalism in Politics and Other Essays* (London: Metheuen, 1962), 64.

[30]*Attia v British Gas Plc* (1988) 1 QB 304 (CA).

[31]Simon Deakin, Angus Johnston and Basil Markesinis, *Markesinis and Deakin's Tort Law*, 5ed (Oxford: Oxford University Press, 2003) 107.

[32]Simon Deakin, Angus Johnston and Basil Markesinis, *Markesinis and Deakin's Tort Law*, 313. Emphasis is mine.

[33]*McLoughlin v O'Brian* (1983) AC 410 (HL).

[34]See Pierre Legrand, "The Same and the Different", 245-8.

[35]Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law*, 40.

[36]Basil Markesinis, "Why a Code is not the Best Way to Advance the Cause of European Legal Unity', cited in Pierre Legrand, "The Same and the Different", 247.

[37]Pierre Legrand, "On the Singularity of Law", *Harvard International Law Journal* 47 (2006): 521.

world' and accordingly submit to the superiority of difference.

Dudgeon v UK[38] and *Lawrence v Texas*[39] present a meaningful example of the operation of sameness and difference approach. For the orthodoxy, both cases provide a fact about the similarity of the decision and the convergence of European law and US law. The two jurisdictions came to the same decision that the statute criminalizing sodomy was invalid. However, the fact that they are situated differently makes the similarity claim a hasty conclusion. The two decisions are haunted by different culture. In *Dudgeon*, what governs is privacy, necessity, pressing social need or proportionality, and the idea of Europeanization. While in *Lawrence*, the underlying idea is rational-basis review, fundamental rights, strict scrutiny review, substantive due process, and judicial admiration for status.[40] Unlike the orthodoxy's claim, the two decisions in fact provide two different expressions of law.

Since the orthodoxy's conception works through compelling the sameness, it fails to do justice to heterogeneity of human laws and different cultural expressions. It has committed a "symbolic violence" against the differences, the others. In the case of "offer and acceptance", the authors, after describing the relevant provisions in Anglo American law, Romanistic law and German law, argue that '[t]he critic is forced to conclude that on this point the German system is best'.[41] On the one hand, the authors establish that their understanding constitutes the truth-as-correctness. This is the truth, the other is false. On the other hand, by compelling the critic to acknowledge their version of truth they commit a harsh violence against the others.

"Non-orthodox" comparative legal studies, as Pierre Legrand suggests, maintains that any research in comparative legal studies should harbor the principle of 'alterity-in-the-law'. Instead of forcing foreign laws to be the same as ours, comparative legal studies seek to know how other laws differ from ours.[42] Thus, comparative legal studies should counter the tendency toward unification. It should be 'the hermeneutic explication and mediation of plural and different forms of legal experience within a descriptive and critical meta-language'.[43] Comparative legal studies should operate, as Heidegger proposes, to unconceal the nature of thing being studied. But this is not in the sense of achieving a Platonic truth. It adheres to the principle of incommensurability. This means that in comparative research there is no way in which the comparatist can compare laws in order to determine which one is a better or 'best solution'.

The ethics of "non-orthodox" comparative legal studies is that of untranslatability. As Derrida says, 'Peter […] is not a translation of Pierre'.[44] What always happens is rewriting and transformation. But, this is not to say that others cannot totally be understood. What happens is that one cannot understand others as they understand themselves.[45] Although alterity governs, the comparison is inevitable because it is 'the debt that one can no longer acquit'.[46] It is a fact that we cannot translate or compare, but we have to. This inevitable comparison is aimed at acknowledging and respecting the others. It

[38]*Dudgeon v UK* (1981) ECHR, series A, no 45.

[39]*Lawrence et al v Texas* (2003) 539 US 558.

[40]See Pierre Legrand, "Comparative Legal Studies and the Matter of Authenticity"; Pierre Legrand, "On the Singularity of Law", 519.

[41]Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law*, 362.

[42]Pierre Legrand, "Issues in the Translatability of Law" in Sandra Berman and Michael Wood (eds), *Nation, Language and the Ethics of Translation* (Princeton: Princeton University Press, 2005), 30, 34.

[43]Pierre Legrand, "Issues in the Translatability of Law", 41.

[44]"Jaques Derrida: Excerpts from Various Publications", 136.

[45]See Pierre Legrand, "The Same and the Different", 297-8.

[46]"Jaques Derrida: Excerpts from Various Publications", 136.

is inherently valuable to know the other. The duty of "non-orthodox" comparative legal studies is to bear witness and being wise to others. In order to know other laws, comparatists-at-law should assume that those laws are formulated into accord with others' rationality. This is what Donald Davidson calls "the principle of charitable interpretation". Prof Legrand, for instance, proposes three features of comparative legal studies, namely purposefulness, prejudice and resignation.[47] This ethics would reduce the level of violence in dealing with others. Both the orthodoxy and the "non-orthodoxy" are in fact committing a symbolic violence to the other. But, unlike the orthodoxy, this "non-orthodox procedure" is doing 'lesser violence' because it acknowledges the difference and is developed on the basis of respecting the other. It is orientated to 'a politics of remembering, and thus of enablement and empowerment'.[48]

Conclusion

The underlying assumption of the orthodoxy, including in comparative Islamic legal studies, is that there is a pure and objective science of comparative legal studies able to distance itself from "conventions" and its historicity. This assumption is indeed shaky and weak. Legal knowledge is attained through the involvement of pre-understanding, fore-conception. It is prejudged. The comparatist's description of law is also his/her ascription. Law is always law-in-world. It is always embedded in culture, trace. Law is always law-as-culture. There is no the law and its context which is outside the law. The law's context is also the law. There is no out-of-law. All these challenge inevitably the nature of the existing, robust comparative legal studies. There no longer exists an objective account of law. This positivistic view of law was obsolete. The duty of comparative research is not to search for truth-as-correctness. Rather, it attempts to unconceal the latent dimension of law. The orthodoxy's obsession to uniformization of law deceives the fact of difference. Instead of uniformization, there is always singularization. While the orthodoxy in employing the sameness and transcendentalism is committing very strong violence, the "non-orthodoxy" by adherence to alterity and respecting others can minimize this violence to a lesser extent.

[47]Pierre Legrand, "The Return of the Repressed: Moving Comparative Legal Studies Beyond Pleasure" *Tulane Law Review* 75 (2001): 1048-9; Pierre Legrand, "The Same and the Different", n 288.

[48]Pierre Legrand, "On the Singularity of Law", 525.

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